

NTSB Order No. EA-4360

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 12th day of May, 1995

Respondent.

issuance of an Amended Order of Suspension imposing a 30-day suspension of respondent's certificate.²

The law judge, consistent with the parties' express written intent, accepted the settlement and ordered the termination of the proceeding. Fifteen days later, on March 16, respondent filed a "Motion to Set Aside Settlement Agreement and Amended Order of Suspension, and to Re-set Matter for Hearing." The Administrator, in a written opposition filed March 17, argued that the relief sought was unjustified and beyond the law judge's authority to grant since the time for appealing the termination order had run.³ By written order entered on March 20, the law judge denied the motion on the ground that he no longer had jurisdiction over the matter because more than 10 days had elapsed since he had closed the case.⁴ The respondent has appealed that denial to the Board, and the Administrator has filed a motion to dismiss that appeal. For the reasons that follow, we will grant the motion to dismiss.

The Administrator's motion contends that the respondent's April 11 notice of appeal from the law judge's March 20 written order should be dismissed because it was not filed within 10 days after the order was served, as required by Rule 47(a) of the Board's Rules of Practice, 49 CFR § 821.47(a).⁵ We find it

²The Amended Order of Suspension, dated March 1, 1995, calls for the 30-day suspension to begin on or before May 15, 1995. As a result, the Administrator has asked for expedited consideration of its motion to dismiss. Consistent with that request, we have endeavored to process this matter with dispatch.

³Out of apparent recognition that the Administrator's position as to the law judge's authority might be correct, respondent on March 20 filed a motion asking the Board directly for the relief it requested of the law judge in the March 16 motion.

⁴Copies of the law judge's orders of March 1 and 20 are attached. The March 1 order is an excerpt from the hearing transcript.

⁵Rule 47(a) provides as follows:

§ 821.47 Notice of Appeal.

(a) A party may appeal from a law judge's order or from the initial decision by filing with the Board and serving upon the other parties (pursuant to §821.8) a notice of appeal within 10 days after an oral initial decision or an order has been rendered or a written decision or a final or appealable (see § 821.16) order has been served. At any

unnecessary to determine whether the respondent filed a timely appeal from the March 20 decision,⁶ for the dispositive issue here is not whether the respondent timely sought Board review of the law judge's determination that he lacked authority to rule on the motion to set the settlement aside.⁷ Rather, the only question to be decided is, we think, whether good cause exists to excuse the respondent's failure to present that motion within 10 days after the law judge terminated the proceeding on March 1.⁸ We cannot find that it does.

Respondent contends that the settlement should be set aside essentially because its owner was not aware that the suspension of its Part 135 certificate might have a bearing on its entitlement to conduct, after the 30-day suspension of that certificate expired, mail, cargo, and passenger operations it is authorized to perform pursuant to a certificate it holds under (...continued)

time before the date for filing an appeal from an initial decision or order has passed, the law judge or the Board may, for good cause shown, extend the time within which to file an appeal, and the law judge may also reopen the case for good cause on notice to the parties.

⁶At the same time, we note that the order, which indicates that it was "entered" on March 20, lacks a service date, an omission our law judges should be careful to avoid.

⁷The respondent's obvious interest is to have the matter reinstated before the Board, not to contest a ruling by the law judge on the scope of his jurisdiction that is clearly consistent with the applicable Board rule of practice (Section 821.47(b) provides, in part, that: "A law judge may not reconsider his initial decision once the time for appealing to the Board has expired or once an appeal with the Board has been filed.") and relevant Board precedent, see, e.g., Administrator v. Doll, NTSB Order No. EA-3439, at p. 5, n. 9 (1991), Farley v. Administrator, NTSB Order No. EA-4231 (1995). As a technical matter, however, we would point out that law judges should dismiss, rather than deny, motions not properly before them.

⁸A law judge's refusal to grant an untimely request for relief from an earlier, appealable order or decision does not afford a party additional time, or a new 10-day period, within which to appeal the merits of such an order to the Board. Moreover, whether designated a notice of appeal or a motion under Section 821.14 of our rules, a party may not, after the 10 days for appealing from a law judge's order has run, obtain Board review of the order without demonstrating good cause to excuse the failure to submit the request for further Board action, however it may be styled, on time. See Administrator v. Compton, 4 NTSB 866 (1983).

Section 401 of the Federal Aviation Act of 1958, as amended.⁹ We intimate no view on whether the respondent's lack of knowledge in this regard constitutes a mistake of fact or law that would justify the nullification of a settlement that, although negotiated at length by counsel for respondent and the Administrator, does not address the subject of the continued validity of respondent's 401 certificate. However, if respondent wanted, for this reason or any other, to have its terminated appeal reopened, it was obligated to so advise the law judge or the Board within the time for filing an appeal or to demonstrate why such advice could not have been provided during the relevant timeframe.¹⁰

In this connection, we note, first, that since the respondent's March 16 motion represents its earliest effort to apprise the law judge that it wanted the settlement revisited, it was already 6 days out of time either for enlisting the law judge's assistance in the matter or for requesting Board review of the termination. Second, we note, with respect to the issue of justification for the delay in communicating the respondent's dissatisfaction with the settlement, that it is clear, from documents submitted in support of both the March 16 motion to the law judge and the March 20 motion to the Board, that the respondent recognized on March 1 that the settlement agreement's silence on the 401 certificate was at least a potential problem, for it sought unsuccessfully on that date, and again on March 7, to obtain written assurances from the Administrator that the Part 135 certificate suspension would not affect its ability to resume 401 certificate operations when the former certificate was returned to it. Given these circumstances, we cannot find that respondent's failure to act to reinstate its appeal within 10 days after the law judge terminated the proceeding was excusable.¹¹ Absent justification establishing good cause for the untimeliness, the appeal will be dismissed. See Administrator v. Hooper, 6 NTSB 559 (1988).

⁹Under Section 401 of the Act, the Department of Transportation, rather than the FAA, is authorized to issue certificates of public convenience and necessity.

¹⁰This does not mean that the law judge or the Board would necessarily have agreed that setting aside the settlement was appropriate in the circumstances.

¹¹It appears that respondent found it necessary to obtain new counsel before returning to the Board with its objection to the settlement. It does not appear from the record, and respondent does not explicitly argue, that that circumstance should in any way be deemed to justify respondent's untimeliness in its efforts to raise an issue concerning the settlement in order to have an appeal from the original suspension order re-docketed.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's motion to dismiss is granted;
2. The respondent's motion for an extension of time to file an appeal from the law judge's March 20, 1995 order is dismissed as moot; and
3. The respondent's appeal in Docket 13881 is dismissed.¹²

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIT, Member of the Board, concurred in the above order.

¹²On April 24, 1995, respondent filed a motion to dismiss the Administrator's complaint for lack of jurisdiction, raising, apparently for the first time in this matter, an issue as to whether the charges in the amended complaint involved a civil or a public aircraft. In light of the prior termination of respondent's appeal, we have no occasion to rule upon its belated motion, to which the Administrator filed a response in opposition on May 8.